Supreme Court, U. S.
FILED
JAN 6 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-117

NATIONAL BROILER MARKETING ASSOCIATION,
Petitioner,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE STATES OF ALABAMA, ET AL. AS AMICI CURIAE

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BRIEF FOR THE STATES OF ALABAMA, ET AL. AS AMICI CURIAE

This brief is submitted pursuant to Rule 42(4) of the Court's Rules by the States of Alabama, Colorado, Connecticut, Florida, Illinois, Iowa, Kentucky, Louisiana, Massachusetts, Michigan, Missouri, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island and Virginia.

INTEREST OF THE AMICI CURIAE

In recent years, these States have been aggressive litigants under the federal antitrust laws, suing for damages and injunctive relief on their own behalf, on behalf of subordinate political entities and, where feasible, on behalf of individual consumers. In addition to reinforcing federal antitrust enforcement and increasing enforcement efforts under State antitrust statutes, such "private" actions recoup for State and local governments and for individual citizens some of the losses that such consumers of goods and services suffer by reason of anticompetitive activities.[1]

In execution of their public responsibilities, the undersigned Attorneys General began actions under sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, based upon allegations essentially the same as those of the original government complaint below. These actions, which seek damages and injunctive relief on behalf of the States and their cities, counties and other political subdivisions,[2] are brought against both petitioner National Broiler Marketing Association ("NBMA") and thirty-eight companies, of which some are or were NBMA members and the others were non-member participants in NBMA pricing and production-limitation programs. The answers in these actions, like the answer below, assert that NBMA's pro-

[1] *Cf.* Antitrust Improvements Act of 1976 Title III (Parens Patriae), 90 Stat. 1390, 1394-1396, 15 U.S.C. §§ 4C-4E.

[2] Each of the *amici* states filed a separate class action covering its own jurisdiction, and the Connecticut case asserts a nationwide class of other States and their larger political subdivisions. In addition, class actions were filed on behalf of supermarkets, hotels, restaurants, fast food establishments and wholesale distributors. All of the cases have been consolidated under 28 U.S.C. § 1407 in the same district where the present action is pending. *In re Chicken Antitrust Litigation*, M.D.L. No. 237, N.D. Ga. No. C74-2454A.

grams are exempt from antitrust scrutiny by reason of the Capper-Volstead Act, 7 U.S.C. § 291.[3]

The question before this Court is whether the Capper-Volstead Act permits chicken processors to fix the prices and restrict production of ready-to-cook chickens, raised for them by independent "contract growers," under the cloak of the antitrust exemption granted for the formation of "farmer" cooperatives. This question is important not only for the outcome of this case and the related cases in which *amici* are plaintiffs, but also for the more general protection of the interests of both public and private consumers of agricultural products. The States agree with the government and the court of appeals that the partially integrated processors belonging to NBMA ("integrators"

[3] The original government complaint, like the complaints filed by *amici*, included allegations of behavior by NBMA and its members which would have been unlawful even if NBMA had been a legitimate farmer cooperative. In particular, it was alleged that NBMA had been used as the vehicle for an agreement to restrict production of broiler chickens—an activity not permitted to Capper-Volstead cooperatives, which may only "act together * * * in collectively processing, preparing for market, handling, and marketing * * * products of [their members]." 7 U.S.C. § 291. In addition, the original government complaint alleged that NBMA members had conspired with non-member chicken processors; any Capper-Volstead immunity protects only activities within the membership and does not permit concerted action with non-members. *United States* v. *Borden Co.*, 308 U.S. 188, 204-205. Although NBMA's answer, like the answers to the complaints of *amici*, claimed total Capper-Volstead exemption, it was apparent that these allegations presented issues not clearly resolved by a favorable answer to the Capper-Volstead eligibility question.

Following partial summary judgment in NBMA's favor on the eligibility question, the government amended its complaint so as to eliminate these allegations for the nonce in the interest of prompt appellate review of the eligibility question. However, as the court of appeals noted (App. 118), the amendment was without prejudice to the filing of a separate government action realleging the unlawfulness of the production restrictions and the combination with non-members. Because of this proviso and the pendency of these allegations in the "private actions" these issues remain very much alive as a practical matter.

in petitioner's terminology) are not "farmers" within the meaning of the Capper-Volstead Act.

This brief does not attempt to answer comprehensively the arguments presented in petitioner's brief. We comment at the outset upon petitioner's contention that "the term farmer is one of extension rather than limitation" (Pet. Br. 14) and so extensible as to include a corporate "integrator." We then turn to petitioner's assertions about NBMA's activities and their economic effects—assertions that are unsupported by the limited record below, are refuted by NBMA's own public statements and are in any event irrelevant to the issue of statutory construction now before the Court.[4]

I. NBMA'S MEMBERS DO NOT QUALIFY AS "PERSONS ENGAGED IN THE PRODUCTION OF AGRICULTURAL PRODUCTS *AS FARMERS*"

Petitioner accurately summarizes its textual argument as resting upon the proposition that "A 'farmer' is someone engaged in * * * agricultural production" (Pet. Br. 9). The weakness of this proposition is that it contradicts the express language of the Capper-Volstead Act, which makes the cooperative exemption available only to "persons engaged in the production of agricultural products *as farmers* * * *."[5] Thus, it is not enough to be a "person engaged in agricultural production"; in order to qualify, it is necessary to belong also to the more limited subcategory of "farmers." Although the district court incorrectly held that NBMA's members were "farmers", it recognized correctly that the term "farmer" has independent limiting significance:

> "[I]t is conceded that ready-to-cook broilers are agricultural products. The government and the defendant part company, though, over whether the members [of NBMA] are engaged in the production of these products as farmers" (App. 84).

The court of appeals similarly framed the issue (App. 121) and properly disagreed on the scope of the "farmer" subcategory.

In context, the legislative history excerpt cited by petitioner for the proposition that "the term farmer is one of extension rather than limitation" (Pet. Br. 14) shows the exact opposite: After Senator Kellogg responded that the phrase "as farmers, planters, ranchmen, dairymen, nut or fruit growers" was "descriptive of the general subject," the colloquy went on as follows:

> "Mr. CUMMINS: I think the Senator does not exactly catch my point. Take the flouring mills of Minneapolis: They are engaged, in a broad sense, in the production of an agricultural product. The packers are engaged, in a broad sense, in the production of an agricultural product. The Senator does not intend by this bill to confer upon them the privileges which the bill grants, I assume?

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[4] The plaintiffs in the private actions have entered into settlement agreements with most of the defendants other than NBMA. These settlements are, however, subject to certain contingencies, as well as court approval under F.R.Civ.P. 23(e), and are without prejudice to the States' claims for injunctive and other relief against NBMA, the present petitioner.

The settlement agreements provide for creation of settlement classes covering all State and local governmental entities throughout the United States and all other purchasers of chickens which are either members of the classes asserted in the complaints or are identified by the settling defendants. If the settlement is consummated there would be a total payment of approximately $30 million covering all claims for the period since NBMA was formed; the State and local governmental entities would receive approximately $3 million.

[5] 7 U.S.C. § 291; emphasis added. The other subcategories listed in the Act—"planters, ranchmen, dairymen, nut or fruit growers"—obviously have nothing to do with the raising or processing of chickens, and petitioner has not contended otherwise. However, the specificity of these other subcategories suggests that the term "farmer" should be read restrictively.

"Mr. KELLOGG: Certainly not; and I do not think a proper construction of the bill grants them any such privileges. The bill covers farmers * * *" 62 Cong. Rec. 2052 (1922).[6]

The House Report on the bill gave as an example of its purpose the plight of grain growers who were "forced to sell their grain to the large terminal elevator companies" because "they can not under existing law combine for the purpose of creating a common marketing agency * * *." H.R. Rep. No. 24, 67th Cong., 1st Sess. p. 2 (1921). Farmers were to be encouraged to displace one level of corporate middlemen standing between themselves and the consumer by organizing their own marketing agencies. The Act was to foster "the processing by the farmers' own association of the product which the farmer himself produces." 62 Cong. Rec. 2053 (1922) (Senator Kellogg); see also, *e.g.*, 61 Cong. Rec. 1033 (Representative Volstead), 2217 (Senator Calder), 2269 (Senator Norris, stating that "In other words, we want to take away the profits of the middlemen.") (1921). In the poultry context, the Act was designed to encourage growers to integrate *forward* by forming cooperatives for collectively processing and marketing the broiler chickens they raise.

The members of NBMA are mostly large chicken-processing companies which sell ready-to-cook chickens to retailers, wholesalers and larger-scale consumers. They include, or have included during the period covered by this litigation, such giant conglomerates and multimillion dol-

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[6] The House Report on the bill stated that the limitations appearing in the definition of eligibility "are aimed to exclude from the benefits of this legislation all but actual farmers * * *." H.R. Rep. No. 24, 67th Cong., 1st Sess. p. 1 (1921).

Petitioner's reference to a statement by an opponent of the Act (Pet. Br. 15) ignores "the danger, when interpreting a statute, of reliance upon the view of its legislative opponents because, in their zeal to defeat a bill, they understandably tend to overstate its reach." *NLRB* v. *Fruit and Vegetable Packers, Local 760*, 377 U.S. 58, 66.

lar corporations as Wilson & Company, Inc., Ralston Purina Company, Marshall Durbin Companies, and Valmac Industries, Inc. Non-member participants in the NBMA programs challenged by the government and by *amici* included such other companies engaged in the processing and sale of ready-to-cook chickens as Allied Mills, Inc., Cargill, Inc., Conagra, Inc., Heublein, Inc., and the Pillsbury Company. NBMA's members alone accounted for approximately 37 percent of all broiler chickens slaughtered in federally inspected plants in 1972 (App. 94), and the non-member participants accounted for a substantial additional fraction.[7]

Although most of these "integrator" companies have breeder flocks and hatcheries (as well as feed mills), they most strongly resemble the middlemen who were the targets, not the intended beneficiaries, of the Capper-Volstead Act. To the extent they are involved in the *production* of chickens, it is through *backward* integration—the exact converse of the forward integration by farmers that Congress sought to encourage. Most important, these companies' involvement in production does not include the actual raising of chickens or the ownership or operation of chicken raising farms; for economic reasons of their own choosing, they have arranged for the chickens they process and sell to be raised by independent "contract growers."

Whatever the status of the "integrator" companies might be if they owned or operated chicken farms, the fact remains that they do not, and the *sine qua non* of being a "farmer" is having a farm. The court of appeals

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[7] A U.S. Department of Agriculture report has noted the "long-run trend toward greater concentration of broiler processing," with 48 firms handling 70 percent of the total volume as early as 1968. Economic Research Service Report No. 930, *The Chicken Broiler Industry: Structure, Practices and Costs* (1971) at pp. 10-11. The Report further found that some 75 percent of the chickens sold in supermarkets were shipped directly by processors without the intervention of any distributor or wholesaler. *Id.* at p. 30.

properly concluded that "Whatever else farming may mean, an irreducible minimum must be either husbandry of animals or crops or farm ownership" (App. 123) and that "the legislative history of Capper-Volstead has only reinforced our conviction that Congress meant 'farmers' to be read in [this] ordinary sense * * *" (App. 124). The hypothetical corporate plantation owner to which petitioner's brief points as an analogue (pp. 15-16) differs from NBMA's members precisely because it owns and operates the farm on which the agricultural product is raised. Because NBMA's members do neither, but rather subcontract out the raising of the agricultural products they process and sell, they have not become chicken farmers.[8]

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[8] Congress reiterated the distinction between farmers and integrated processors such as NBMA's members when it enacted the Agricultural Fair Practices Act of 1967, 7 U.S.C. § 2301 *et seq.* That Act prohibits "handlers" from coercing or interfering with the rights of "producers" to form and participate in the activities of Capper-Volstead cooperatives. The definition of "handler" specifically includes companies which have contractual relationships like those between NBMA's members and their contract growers, and there is no question that the statutory term "producers" includes contract growers of chickens. What is particularly pertinent for present purposes is that the definition of a "producer" in the Agricultural Fair Practices Act is taken substantially verbatim from the Capper-Volstead Act's description of those eligible to form cooperatives exempt from the antitrust laws: "a person engaged in the production of agricultural products as a farmer, planter, rancher, dairyman, fruit, vegetable or nut grower" (7 U.S.C. § 2302(b)). Thus it is plain that in 1967 at least Congress viewed chicken "integrators" not as persons eligible to form exempt cooperatives but rather as economic antagonists from which such persons needed protection. The legislative history shows a deliberate determination to "[go] back to the Capper-Volstead language" as "more in keeping with the traditional definition of producers * * *." Colloquy among Sen. Aiken and Messrs. Angevine and Neely of U.S. Department of Agriculture, *Hearings on Substitute Amendment S109 Before A Subcomm. Of The Senate Comm. on Agriculture and Forestry*, "Discrimination Against Members of Farmer Cooperatives," 89th Cong., 2d Sess. 182 (1966).

II. THE ECONOMIC PURPOSES OF THE CAPPER-VOLSTEAD ACT WOULD NOT BE SERVED BY ALLOWING CHICKEN PROCESSORS WHICH SELL DIRECTLY TO RETAILERS AND LARGE CONSUMERS TO FIX PRICES AND RESTRICT PRODUCTION

Petitioner begs the question in arguing that the Capper-Volstead Act would suffer an "enormous constriction" unless it is interpreted so as to protect "the poultry industry" (Pet. Br. 20). The intent of Congress in 1922 was decidedly not to protect sellers of processed food products such as the corporations who make up NBMA, and it is not the courts' obligation to stretch the Act beyond its original scope so as to accommodate the desire of these giants of "the poultry industry" for backward integration through contractual arrangements of their own choosing. Any such plea should be addressed to Congress.

Equally spurious, and similarly impertinent to the question of who is a "farmer," are petitioner's contentions (1) that it should be allowed a blanket Capper-Volstead exemption because it has merely engaged in "an exchange of price information designed to stabilize the broiler market" (Pet. Br. 21-23) and (2) that exempting processors will have a salubrious "trickle-down" effect upon the contract growers who are the small farmers intended to benefit from the Capper-Volstead Act (Pet. Br. 23-27).

A. The NBMA Programs For Which Exemption Has Been Claimed Go Far Beyond Information Exchanges And Include Price Fixing And Production Restrictions.

Petitioner's appellate counsel seizes upon the fact that the government's amended complaint was artificially simplified in the interest of prompt appellate review of the "farmer" question (see note 3, *supra*), arguing that exempting NBMA from the antitrust laws would be rela-

tively harmless and even desirable because NBMA's programs merely "exchange price information * * * with a view toward stabilizing the market for broiler chickens" (Pet. Br. 21-22). This argument is inconsistent with the position that NBMA took in the district court and is taking in the related cases in which *amici* are plaintiffs, where it has claimed a Capper-Volstead exemption for all of its alleged activities, including concerted action "to reduce the number of broilers available for marketing" (Government Complaint ¶ 10(i)) as well as straightforward price fixing which continues to be alleged in the amended complaint (¶¶ (b), (c) and (e), App. 95). In any event, a blanket antitrust exemption for NBMA and other similar combinations of agricultural processors can hardly be justified by an unproved assertion that NBMA has so far engaged only in economically desirable concerted action.[9] Compare, *e.g.*, *United States* v. *McKesson and Robbins, Inc.*, 351 U.S. 305, 310, 315-316; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-224. If NBMA is as confident as it claims to be about the propriety of its programs, it has no need for an exemption and should proceed to defend those programs on their merits under the Sherman Act.

NBMA has publicly acknowledged—in reliance upon its purported antitrust exemption—that its *raison d'etre* is to eliminate "dog-eat-dog" competition in favor of a "live-and-let-live philosophy [designed to] help everyone." Interview with Richard E. Larkin (NBMA chief economist), *Broiler Industry*, November 1971, p. 36. To this end, NBMA conducted a telephone conference call program

[9] The record below is limited and does not explore either NBMA's activities or the economics of the broiler chicken market. Petitioner's characterization of that market is constructed entirely from two sentences in the "statement of facts not in dispute" filed by NBMA in support of its partial summary judgment motion (App. 14-15). Surely this is not a sufficient basis for the factual inferences upon which petitioner asks this Court to base a decision in its favor. Compare *White Motor Co.* v. *United States*, 372 U.S. 253.

among its members and cooperating non-members in which supply and price information was collected from the participating companies and analyzed by NBMA's "marketing committee," which then developed "suggested prices" and production recommendations which were communicated back to the companies on a weekly basis. The marketing committee "recommended a market level" at a specific price for each of the major cities in which chickens are sold. Interview with Bob M. Anthony (NBMA general manager), *id.* at p. 44. It also "passed a resolution authorizing standards for pricing undergrades" at specific differentials below the prices for perfect birds. Interview with C. V. Magruder (NBMA staff member), *id.* at p. 28. With respect to the production-restriction program, NBMA's chief economist noted for publication that

> "NBMA member plants, operating in both July 1970 and 1971, reduced their slaughter 6.5% in July from a year earlier. This compared to only 4.4% in non-member plants. The 11 largest NBMA member plants reduced their slaughter an average of 14.2%! The average reduction per plant was over *twice* as large in NBMA member plants as nonmember plants." Interview with Richard E. Larkin, *id.* at p. 35.[10]

NBMA publicly assessed the first year of operation under its pricing and production programs as follows:

> "* * * [W]e have been able to influence the market with regard to timing and pricing of product within the week. Our conference calls have been invaluable in this regard and, of course, are perfectly legal.

[10] Apart from export sales and certain surplus disposal programs which are themselves questionable (*Socony-Vacuum Oil Co.* v. *United States*, 310 U.S. 150), NBMA's members engage in no actual joint marketing. Each member markets, sells and delivers its own chickens, and the "cooperative" activities consist of the kind of consultation and coordination in limiting production and fixing prices that we describe in the text.

> This has been worth perhaps a cent a pound liveweight to industry within our first anniversary year." Interview with Bob M. Anthony, *id.* at p. 38.
>
> "* * * I think we can say, beyond reasonable doubt, that NBMA has been responsible for perhaps one cent of the 1.4 cent increase compared with what history over the last 11 years would have suggested. The improvement was so substantial, and so contrary to the historical projection, that I would place the probability of happenstance as high as 95 to 1." Interview with Richard E. Larkin, *id.* at p. 30.

The *published* evidence is, naturally, only the tip of the iceberg. It suffices, however, to make it clear that NBMA has used its purported antitrust exemption both broadly and imaginatively as a license for activities that—absent the exemption—are *per se* antitrust violations of the most elementary kind.

B. The Contention That The True Chicken Farmers (Contract Growers) Benefit From The NBMA Combination Is Both Unsupported And Irrelevant.

Relying on dire predictions in the trade press (Pet. Br. 25 & n.24), petitioner argues that denial of an antitrust exemption to chicken processing companies will result in still further integration, squeezing the contract growers out of business and thereby frustrating the congressional solicitude for small farmers (Pet. Br. 23-26). There is no support for such a prediction in the barren record below, and it may reasonably be doubted whether an inability to fix prices will cause the processing industry to change a system that otherwise serves its economic interests and, by petitioner's admission, "is consistent with the achievement of maximum efficiency" (Pet. Br. 26).[11] In any event, such

[11] Replacing contract growers through integration would more than double a processor's required investment, for the value of the growers' land and equipment exceeds the value of the breeder flocks, hatchery and processing facilities owned by the otherwise integrated processing companies which they serve (App. 23-24). It is doubtful that many processors could or would hasten to make such major additional investments.

per se violations as price fixing and production restrictions have never been excused or exempted in response to claims that they serve other values or prevent economic doom. *E.g., Goldfarb* v. *Virginia State Bar*, 421 U.S. 773; *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1; *Northern Securities Co.* v. *United States*, 193 U.S. 197, 351. The rule of reason would be peculiarly unsuited to a determination of eligibility under the Capper-Volstead Act.

Petitioner's attempt to justify an NBMA antitrust exemption because of its supposed benefits to contract growers is similar to the argument rejected in *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 389 U.S. 384. Sunkist argued that membership by non-grower "agency packing houses" in its cooperative should not disqualify it from the Capper-Volstead exemption because the packing houses passed along the benefits of membership to the growers they served. This Court rejected the argument "that Congress, in enacting the measure, intended to give sanction to any organizational form by which the benefits of collective marketing inured to the grower." 389 U.S. at 389-390. It held, rather, that both the language and the legislative history of the Act limited the exemption to cooperatives made up of growers themselves; "we are not justified in expanding the Act's coverage, which otherwise appears quite plain." 389 U.S. at 393. So also here, the statutory limitation of membership to "farmers" cannot be avoided by speculation that the interests of farmers might suffer unless processors as well are exempted from the antitrust laws.

CONCLUSION

For the foregoing reasons and those stated in the government's brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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